

REMARKS

This amendment is being submitted with a Request for Continued Examination and responds to the final Office Action mailed October 23, 2002. Claim 1 has been amended herein. Claims 1, 2, 4-9, and 20-24 are currently pending.

The Examiner has rejected Claims 1, 2, 4-7 and 9 under 35 U.S.C. §102(b) as anticipated by Godefroy et al. U.S. Patent No. 5,683,463 ("Godefroy et al.").

According to the Examiner:

...The recitation that the prosthesis is a "bone or bone-derived" implant has not been given patentable weight because it has been held that a preamble is denied the effect of a limitation where the claim is drawn to a structure and the portion of the claim following the preamble is a self-contained description of the structure not depending for completeness upon the introductory clause. . . . The tabs can [sic] be construed to be "configured for retention" since it has been held that the recitation that an element is "configured for" performing a function is not a positive limitation but only requires the ability to so perform. It does not constitute a limitation in any patentable sense.

With respect to the Examiner's refusal to give the recitation "bone or bone-derived" any patentable weight due to its being in the preamble, said recitation is now in the body of Claim 1, which applicants respectfully submit obviates this rejection. Moreover, Claim 1 now specifies that both the configuration and dimensions of the osteoimplant's tabs permit their retention in corresponding preformed recesses within a vertebral body.

Nowhere does Godefroy et al. disclose an intervertebral implant formed from bone or material derived from bone having at least two tabs extending radially outward from the substantially cylindrical body portion of the implant, said tabs possessing a configuration and dimensions complementing the configuration and dimensions of corresponding preformed recesses within the vertebral body as presently recited in amended Claim 1. Rather, Godefroy et